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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 19

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

No. 20

NEPTUNE METER COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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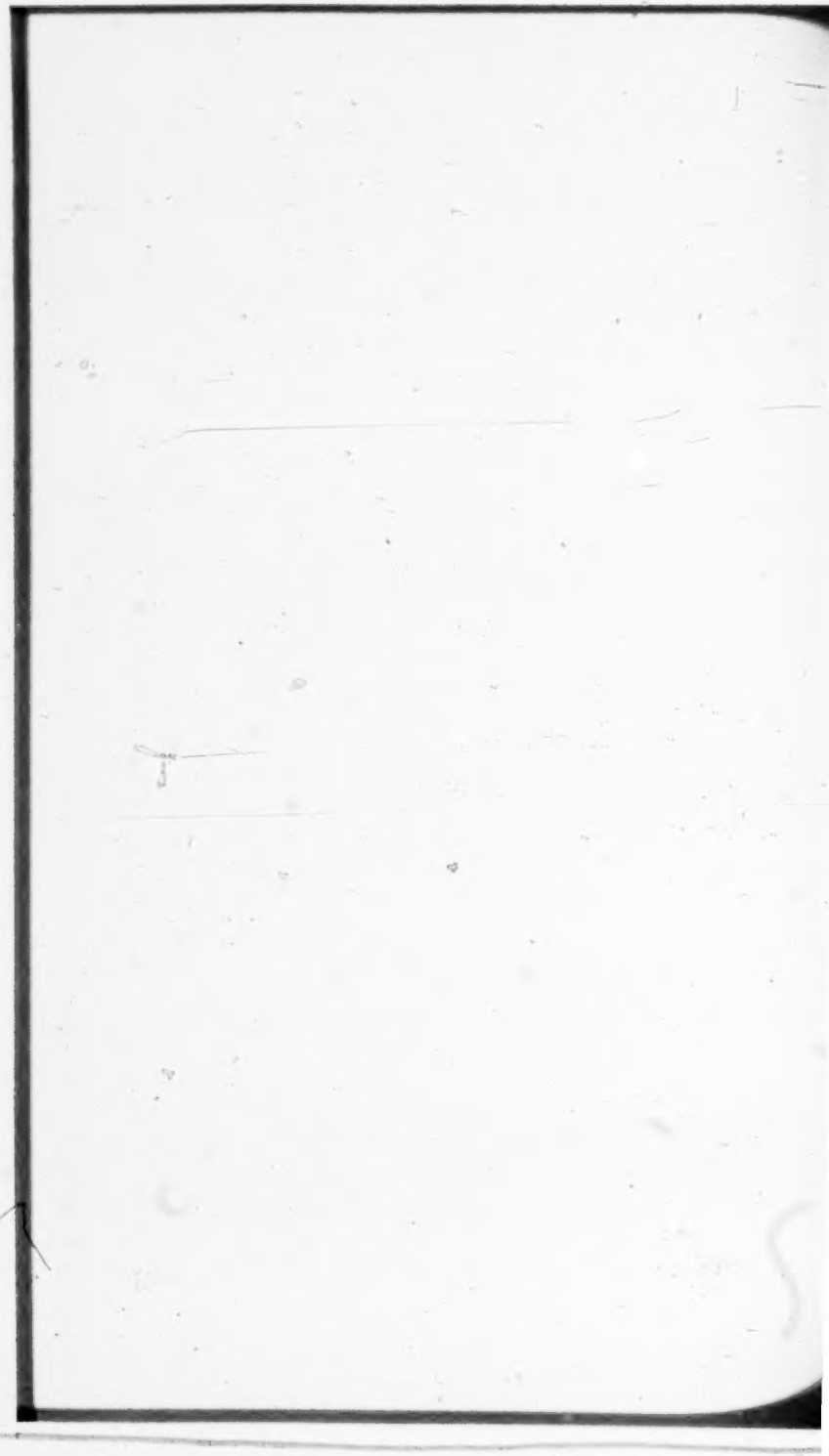

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Petitioner, Neptune Meter Company, presents this Supplemental Brief in support of its Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit filed on January 17, 1947 and numbered 905 and 906 of the October Term, 1946. The Independent Employees Association of the Neptune Meter Company also filed a Petition for a Writ of Certiorari, formerly No. 917 of the October Term 1946, and now No. 22. The purpose of this Supplemental Brief is to bring to the attention of this Court the impact upon the issues involved of the amendments to the National Labor Rela-

tions Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) effected by the enactment of the Labor—Management Relations Act, 1947 on June 23, 1947 (Public Law 101, 80th Cong., 1st Sess.). We will show in Point I *infra*, page 8, that this Court will give effect to changes in the law occurring while cases are pending on appeal, especially where no private rights are involved. The arguments presented herein are in addition to those advanced in the original brief.

POINT I

The orders of the National Labor Relations Board would not be issued by the Board, nor affirmed by the Circuit Courts, today.

The orders entered by the National Labor Relations Board (hereinafter called the "Board") in both cases now sought to be reviewed directed Petitioner to "completely disestablish" unions of its employees which the Board had found to be either "company-dominated", or a "successor" to a company dominated union. 58 NLRB 1240; 66 NLRB 292. Both orders were affirmed, with modifications not relevant here, by the Circuit Court of Appeals for the Second Circuit, with one judge dissenting, 158 F. 2d 448. The remedy of complete disestablishment was one which the Board, prior to the passage of the Labor—Management Relations Act of 1947, had reserved exclusively for unaffiliated unions. Under similar circumstances involving a union affiliated with one of the large international or national organizations, the Board would merely order the respondent company to cease giving effect to its contract with the particular union and to withdraw all recognition from it, but would withhold the drastic remedy of disestablishment. This was recognized by Mr. Paul Herzog,

the Chairman of the Board, who said in his prepared testimony before the Senate Committee on Labor and Public Welfare,

> "The Board, where it has found unions company dominated has accordingly used its power, as required by section 8(2) of the National Labor Relations Act, to disestablish such unions, for only by the disestablishment of company dominated unions can the employees begin to exercise a free and untrammeled choice of bargaining representatives.
>
> "It is true, as we pointed out in our earlier statement, that where the Board has found that an employer has assisted or coerced its employees to join a union affiliated with a national labor organization, it has not ordered the disestablishment of the local." (Hearings before the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Session, Vol. 4, p. 1912.)

An amendment to the law was aimed directly at correcting this practice of the Board. The following new sentence was inserted in old Section 10(c):

> "And provided further, That in determining whether a complaint shall issue alleging a violation of Section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope."

The committee and conference reports leave no doubt that this amendment was aimed directly at the former practice of the Board of ordering disestablishment of unaffiliated unions but not in the case of affiliated unions although

the evidence as to domination and support was identical. For example, the Conference Report states:

> "(9) To prevent discrimination by the Board to the disadvantage of independent unions and representation plans, the House bill and the Senate amendment both included in section 10(c) of the amended act, in substantially similar terms, a provision to the effect that no order of the Board should require or forbid any action by an employer with respect to any labor organization that in similar circumstances would not be required or forbidden with respect to a labor organization national or international in scope, or affiliated with such an organization. In the past the Board has made findings of violation of section 8(2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations. The conference agreement adopts the language of the Senate amendment, which requires equal treatment for both affiliated and nonaffiliated organizations. *The language of the Senate amendment and the conference agreement in this respect is directed at orders under section 8 (a) (1) and section 8 (a) (2).* This specification is not intended to imply that independent and affiliated unions can or should be treated differently under other provisions. Rather, the language covers the specific abuse which has come to the attention of Congress. It does not invite others." (House Report 510, 80th Cong., 1st Session, p. 54-55) (Emphasis supplied)

See also the views of the Senate Committee, Senate Report No. 105, 80th Cong., 1st Session, pages 12-13 under the heading "Equality of Treatment for Independent Unions" and at page 26, discussing amendments to Section 10(c). For the views of the House Committee, see House Report No. 245, 80th Cong., 1st Session, page 42, comment B under Section 10(c). The foregoing can leave no doubt that it was the intention of Congress to require the Board to adopt a uniform policy with respect to independent and affiliated unions, particularly in cases where company domination is alleged.

Under settled principles, this Court should leave the formulation of such new and uniform policy in the first instance to the considered reasoning of the Board, and accordingly should remand these cases to that agency for further proceedings not inconsistent with the National Labor Relations Act, as presently amended. Counsel is advised by counsel for the Keystone Steel & Wire Company that the Board and that Company have agreed to submit a stipulation in *NLRB* v. *Keystone Steel & Wire Co.*, No. 9 for the October Term, 1947, in this Court, which will call for an entry of an order by the Circuit Court of Appeals for the Seventh Circuit not requiring the disestablishment of the independent union involved in that case, although the Board had found it to be company dominated, 62 NLRB 683. The amazing similarity between the facts in the *Keystone* case and in the case at bar was pointed out in the Petition in No. 19, pages 9-10; 13-14.

POINT II

The scope of review by Circuit Courts of Appeals has been enlarged.

The question of the proper standard of review was raised in the Petition for a Writ of Certiorari and accompanying Brief filed on January 17, 1947 in Case No. 905, now No. 19 for the October Term, 1947, and it was there urged that even under the Act as it then existed, the Circuit Court had excessively limited the scope of its reviewing power, (Petition, No. 19, pp. 17-20). In view of the amendement to the National Labor Relations Act with respect to this very point the necessity for a review of the decision of the Court below, either by this Court or by the Circuit Court itself, becomes even more apparent. For example, the gravamen of the Circuit Court's opinion is found under the Court's heading, "This Court's Limited Authority," (R. 764-770).* Interspersed in its opinion, the Court said, "our statutory authority is severely restricted," (R. 764); " 'the decision of the Board upon that question is for all practical purposes not open to us at all,' " (R. 765) and "having in mind, then, our narrowly limited authority" (R. 770). In view of the foregoing, the effect of an enlargement in statutory authority should be considered by this Court, or, more properly, by the Court below.

The controlling language of Section 10(e) of the National Labor Relations Act, which formerly read "The findings of the Board as to the facts if supported by evidence shall be conclusive" now reads "The findings of the Board with

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* Inasmuch as the Circuit Court considered the cases together and wrote only one opinion, the references to its opinion are to the page numbers as they appear in the record in No. 19.

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

That the above amendment was unequivocally intended to broaden the scope of review by a Circuit Court of Appeals is evidenced by the following statement from the Conference Report:

> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and section 10(c) insures its deciding in accordance with the preponderance of the evidence. • • • This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreement adopts—*will very materially broaden the scope of the court's reviewing power,*" (House Report 510, 80th Cong., 1st Session, p. 56) (Emphasis supplied.).

A question of this importance in the administration of the National Labor Relations Act should be passed upon in the first instance by the Circuit Court of Appeals.

POINT III

This Court will consider changes in the law occurring while cases are pending on appeal.

As long ago as 1801 Chief Justice Marshall, writing for this Court in *United States* v. *The Schooner Peggy*, 1 Cranch 102, said, at page 110,

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

This rule has been followed consistently by this Court. *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115 (1901); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis* 224 U. S. 503 (1912); *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184 (1921); *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23 (1940); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941); *Ziffrin, Inc.* v. *United States*, 318 U. S. 73 (1943). As recently as September 29, 1947, the Circuit Court of Appeals for the District of Columbia followed this general rule in setting aside an order of the Board in a case which had been argued prior to the enactment of the Labor-Management Relations Act, 1947 because of the

changes in the law effected by that statute. *L. A. Young Spring & Wire Corp.* v. *NLRB* (C. C. A., D. C., No. 9397). In addition, in proceedings before the Circuit Court of Appeals for the Seventh Circuit on the mandate of this Court in *NLRB* v. *E. C. Atkins & Company*, decided May 19, 1947, 331 U. S. 398, the Circuit Court on September 24, 1947 declined to enforce the Board's order, approved by this Court, because of changes in the law effected by the enactment of the Labor-Management Relations Act, 1947, subsequent to the decision of this Court, (order entered September 24, 1947; unreported).

This is particularly true where no private rights can be affected by the subsequent change in the law. This Court pointed out the distinction in *Hodges* v. *Snyder*, 261 U. S. 600, 603, (1923) where the Court said,

> "It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States* v. *Klein*, 13 Wall. 128, 146; *McCullough* v. *Virginia*, 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).
>
> "This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced;"

That the National Labor Relations Act creates no private rights is well settled by the decisions of this Court. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261 (1940); *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940).

CONCLUSION

In view of the amendments to the National Labor Relations Act noted above, it would be proper for this Court to grant writs of certiorari and upon such writs to remand these cases to the Circuit Court of Appeals for the Second Circuit for reconsideration, and determination of the effect to be given such amendments. However, inasmuch as the Board's orders themselves may well have a congenital infirmity by virtue of other amendments to the Act discussed under Point I, *supra*, page 2, it would seem more appropriate, and it is accordingly urged, that this Court order that the Circuit Court remand the cases to the Board in order that that agency may make the initial formulation of a uniform policy with respect to both affiliated and unaffiliated unions in situations involving charges of company domination.

Repectfully submitted,

EDWARD L. COFFEY,
Counsel for Petitioner.

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (U. S. C. #151, *et seq.*), are as follows:

"Sec. 10 (c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the

order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

"Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * *

* * * * *

"No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

* * * * *

"Sec. 10 (f). * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *